In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 492

SAILORS HAVEN FIRE ISLAND, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 14–21) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered May 26, 1969. The petition for a writ of certiorari was filed August 22, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the exclusion from evidence of the report of an appraiser employed by a government agency but not called as a witness invalidates the verdict in a federal condemnation case.

363-301—69

STATEMENT

In 1964 Congress authorized the acquisition of lands on Fire Island, New York for a National Seashore project. The statute required consent of the owners of certain improved properties to condemnation. One of three segments of property owned by petitioners was subject to this limitation. After rejecting an offer of $600,000 for the entire property, petitioners consented to condemnation if all their property was taken, and these proceedings were accordingly filed. Petitioners filed no objection to the proceedings and the parties agreed as to the value of the improved segment. The government vested title and paid $558,500 into court as the estimated value of the premises. After a view of the premises by the jury, extensive evidence was presented in a nine-day trial. Petitioners' appraiser asserted a value of $985,000 and the Government's appraiser expressed an opinion of $300,000; both estimates included $100,000 as the value of the improved parcel. Petitioners also sought to offer in evidence an appraisal report which had been made for the Department of the Interior by Joseph Blake Associates; this report estimated the properties' worth at $600,000. Upon the Government's objection to introducing the report unless Blake was called as a witness, the court excluded the report; Mr. Blake was not called (Pet. App. 23–28). A verdict of $375,000 was returned.

On appeal, as in arguing to the trial court, petitioners conceded that government appraisals used solely for settlement negotiation purposes or for determining the amount of estimated compensation to be deposited with a declaration of taking would not be ad-

missible (Pet. App. 17, 24). Their contention was that the appraisal had been used as a basis for securing an appropriation from Congress, and, therefore, constituted an admission against the interest of the United States (Pet. App. 19–20). Finding that neither federal nor applicable state law supported admissibility on this basis, the courts below held against them.

ARGUMENT

Petitioners' contention that this case involves a question regarding the scope of executive privilege is one made for the first time in this Court, and misrepresents the issues at trial. There was never any question of the government refusing to reveal the Blake report or what the appraisal made in it was. All parties knew of the $600,000 figure, and the government, pursuant to subpoena, had brought both Blake and his report to court and would have offered no objection had petitioners called him as a witness. Pet. App. 23, 42. Petitioners—no doubt for sufficient reasons—did not wish to place Blake on the stand, where his professional qualifications and the manner in which he had arrived at his appraisal would be subject to testing before the jury. It simply wanted to bring the $600,000 figure before the jury, disassociated from the circumstances in which it arose, as a valuation the government had at one point relied on. The government resisted, successfully and correctly, on the ground that this would be tantamount to revealing an offer of compromise. See *Evans* v. *United States*, 326 F. 2d 827, 829–830 (C.A. 8); *United States* v. *Certain Parcels of Land in Arlington County*,

Va., 261 F. 2d 287, 291 (C.A. 4). Thus it was petitioner, not the government, that would have wished to withhold relevant information, that bearing on the credibility of the Blake report, from the jury.

Petitioners' associated claim that they never would have consented to condemnation had they realized that the government's compromise offer of $600,000 did not establish the minimum possible compensation for their property is equally without merit. At most, it establishes faulty judgment on their part in the particular negotiations and trial proceedings of this case. Nowhere does it appear that the government represented to them that its compromise offer represented the lowest amount of compensation that they could expect to receive, or would be the basis of the government's case at any trial. Common sense makes clear that any offer thus presented could not hope to succeed. Petitioners gambled their ability to secure a larger award against the government's case, and lost.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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